

Essay

Nondiscrimination as a Universal Human Right

Aaron X. Fellmeth[†]

I. INTRODUCTION

An important undercurrent in Michael Reisman's work in international human rights law is the law's utilitarian nature. True to the New Haven School, he conceives of human rights not as self-evident and eternal metaphysical truths but as part of the international community's program of promoting shared, fundamental values in the face of fractious opposition by those uncommitted to humanitarianism. And these values center primarily on human life and happiness, or in his felicitous phrasing: "[T]he international human rights program, when stripped of its own more recent mystical overlay, is based on the notion that, in a crunch, human beings and not states matter."¹ The mystical overlay includes a certain reification of human rights that, while useful in advocacy, sometimes obscures the exceptionally mutable nature of many human rights.

One human right in particular—the right to freedom from arbitrary discrimination based on race, sex, or other status—presents special challenges to the integrity of the mystical overlay. All of the major international human rights instruments guarantee the right in some form, and some are specifically oriented toward preventing certain kinds of discrimination.² The uniqueness of the nondiscrimination right arises from two seemingly contradictory aspects of the right. On one hand, the right to equal treatment is a necessary and central component of any coherent ethical system based a priori on the value of human beings. On the other hand, it would be impossible and in any case undesirable for the law even to approach treating all human beings equally. This is the challenge of the nondiscrimination right in a nutshell.

There are several ways to approach discrimination as an expression of the right to equality under law. One approach identifies a limited number of grounds on which distinctions made, supported, or tolerated by a state government will be considered presumptively illegitimate—I'll refer to this as a "protected class approach" of nondiscrimination. Alternatively, distinctions on any ground may be considered in need of justification under some standard

[†] Professor, Arizona State University College of Law. Yale Law School, J.D. 1997; Yale University, M.A. 1997; University of California, Berkeley, B.A. 1993.

1. W. Michael Reisman, *Why Regime Change Is (Almost Always) a Bad Idea*, 98 AM. J. INT'L L. 516, 517 (2004).

2. E.g., Convention on the Elimination of All Forms of Discrimination Against Women art. 5, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; International Convention on the Elimination of All Forms of Racial Discrimination, Annex, *opened for signature* Mar. 7, 1966, S. EXEC. DOC. C, 95-2 (1978), 660 U.N.T.S. 195, 212; Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, at 66, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, U.N. Doc. A/61/49 (Dec. 13, 2006).

of review if they result in the denial of a recognized human right—an “Article 14 ECHR approach” toward nondiscrimination.³ Finally, one might consider any governmental distinction between persons on any grounds to be presumptively in need of justification—a “universal equal rights approach” toward nondiscrimination.

II. PROTECTED CLASS APPROACH

Both Canada in its Charter of Rights and Freedoms⁴ and Human Rights Act 1985,⁵ and the United States through a collection of civil rights statutes, take a protected class approach to nondiscrimination rights. Unlike the Canadian Charter, the Fourteenth Amendment to the U.S. Constitution does not specify that certain classes of persons benefit from equal protection rights and others do not; it merely prohibits states from “deny[ing] to any person within [their] jurisdiction the equal protection of the laws.”⁶ Congress has, however, adopted legislation to protect specific classes of persons from public and some kinds of private discrimination, most prominently in Title VII of the 1964 Civil Rights Act,⁷ the Age Discrimination in Employment Act,⁸ and the Americans with Disabilities Act.⁹ The protection afforded to these classes is not, however, uniform. The Supreme Court has interpreted the Constitution to require that some grounds of discrimination, such as race, benefit from a strong presumption of illegitimacy under the “strict scrutiny” standard.¹⁰ Sex discrimination benefits from a heightened or “intermediate” level of scrutiny.¹¹

But the grounds of discrimination omitted from these laws are as important as—indeed, greatly outnumber—the grounds listed. Neither the

3. European Convention on Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

4. Section 15 of the Canadian Charter of Rights and Freedoms provides:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 15.

5. Human Rights Act, R.S.C., ch. H-6 pt. I, § 3 (1985) (“(1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted. (2) Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex.”).

6. U.S. CONST., amend. XIV, § 1. This language is reflected in several human rights conventions, but the conventions often include additional language clarifying prohibited grounds for discrimination.

7. 42 U.S.C. §§ 2000a, 2000d, 2000e-2, 2000bb to -4, 3604-3606 (2000).

8. 29 U.S.C. §§ 623, 631 (2000).

9. 29 U.S.C. §§ 706, 794 (2000); 42 U.S.C. §§ 12103-12213 (2000).

10. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

11. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Mathews v. Lucas*, 427 U.S. 495, 505-06 (1976).

statutes nor the Supreme Court's interpretation of the Constitution requires that the government justify with special persuasiveness discrimination based on sexual orientation, political affiliation, marital status, parental status, birth out of wedlock, wealth and economic status, youth, and many other grounds. Distinctions on these grounds merely receive "rational basis" review,¹² which is applied with such deference to the political branches as to defy qualification as a meaningful human right.¹³ In general, the U.S. government is free under its domestic law to discriminate against many classes of persons on virtually any ground other than a malicious desire to persecute some disfavored minority group. In one rational review case, the Court's deference to the political branches was sufficiently extreme to provoke Justice Stevens to characterize it, with only the slightest exaggeration, as "tantamount to no review at all."¹⁴

The justification for limiting equal rights under law to certain protected classes is not entirely clear or consistent. In some cases, the greater sensitivity to race has been explained by the "history of purposeful unequal treatment"¹⁵ or "unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."¹⁶ The Court has also held that greater protection is justified for the classes of persons who belong to a "discrete and insular" group or who need "extraordinary protection from the majoritarian political process."¹⁷ While these rationales are appealing, they are also inadequate to explain the Court's jurisprudence; many other classifications, such as sexual orientation, religion, socioeconomic class, and political affiliation (e.g., membership in the Communist Party), should qualify for heightened protection under these tests but do not in fact benefit from strict scrutiny review. The Court has rarely offered any kind of cogent explanation or cited any evidence to support its denial of meaningful scrutiny to discrimination against these groups. For example, in denying heightened scrutiny to discrimination against children born out of wedlock, the Court acknowledged the history of purposeful, unequal treatment against such children, the fact that the status was involuntary, and the fact that they are similarly situated to so-called "legitimate" children.¹⁸ Nonetheless, the Court majority did not consider such discrimination inherently suspect, because, in its opinion, "this discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women

12. E.g., *Mathews*, 427 U.S. 495; cf., e.g., *Ry. Express Agency v. New York*, 336 U.S. 106, 110 (1949) (holding that equal protection analysis is satisfied when a classification "has relation to the purpose for which it made and does not contain the kind of discrimination against which the Equal Protection clause afford protection").

13. One rare exception is *Romer v. Evans*, 517 U.S. 620 (1996), in which the Supreme Court struck down a state constitutional amendment that would have banned antidiscrimination laws and ordinances benefiting homosexuals or bisexuals. The Court did not hold that sexual minorities belong to a protected class; instead, it found the measure failed rational basis review.

14. Federal Commc'n's Comm'n v. Beach Commc'ns, Inc., 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring).

15. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (citing *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

16. *Id.*

17. *Id.* (citing *Rodriguez*, 411 U.S. at 28).

18. *Mathews v. Lucas*, 427 U.S. 495, 504-05 (1975).

and Negroes.”¹⁹ The majority cited literally no evidence in support of this naked assertion, nor did it offer any guidance as to what the standard justifying heightened scrutiny would be. Similarly, the Court has never explained why the benefits of heightened scrutiny are withheld from homosexuals, who fulfill par excellence the criteria of a suspect class—all this while proclaiming, with apparent sincerity, that the Equal Protection Clause “neither knows nor tolerates classes among citizens.”²⁰

The protected class approach offers the advantages of relative clarity about prohibited grounds of discrimination and limitations on judicial review of well-meaning legislation. But whatever the theoretical merits of the approach, in practice it apparently poses difficulties of consistent application. The limitation of rights to specific, identified classes invites favoritism in the worst case and, in the best, susceptibility to the decisionmaker’s cultural, social, or other biases against the unprotected group. Ironically, these are among the very biases that an equal protection standard should neutralize.

The effect of a denial of serious balancing of state and private interests for most groups is to legitimize political discrimination when human rights authorities such as the U.S. Supreme Court defer to the political branches of government instead of justifying protection of a class rigorously and applying the same rationale consistently to other classes laboring under similar disadvantages. If, from social and political biases, the judicial authorities refuse to recognize a vulnerable class as entitled to special protection—for example, sexual minorities,²¹ or childless men and women²²—the class may receive no real protection. The Supreme Court’s application of heightened scrutiny to some classes and not others without evident justification does not merely leave unprotected groups in no worse a situation; it positively validates the state’s discrimination against them by denying the relevance of the very class characteristics that may have provoked the discrimination in the first place.

III. ARTICLE 14 ECHR APPROACH

At first glance, Article 14 of the European Convention seems to take a protected class approach, albeit with a much-expanded list of prohibited grounds of discrimination. The appearance is merely superficial; the inclusion of “or other status” leaves the list of prohibited grounds open-ended.²³ This was no accident; the *travaux préparatoires* of Protocol No. 12 to the

19. *Id.* at 506.

20. *Lawrence v. Texas*, 539 U.S. 558, 584 (2003) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

21. See, e.g., Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, ¶ 25, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006); Aaron Xavier Fellmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, 50 WM. & MARY L. REV. 797, 832 (2008).

22. See generally LAURIE LISLE, *WITHOUT CHILD: CHALLENGING THE STIGMA OF CHILDLESSNESS* (1999) (describing the social and economic disadvantages suffered by women who choose to remain childless); CAROLYN M. MORELL, *UNWOMANLY CONDUCT: THE CHALLENGES OF INTENTIONAL CHILDLESSNESS* (1994) (same).

23. ECHR, *supra* note 3, art. 14.

Convention make clear that the list was never intended to be exhaustive.²⁴ The European Convention does not, then, agree with the U.S. practice of identifying only a limited class of persons who benefit from the equal protection of the laws. In that sense, the Article 14 approach reaches a much broader class of discrimination because a legal distinction operating to the detriment of any person on the ground of some quality or characteristic of that person could—at least theoretically—be grounds for condemnation of the distinction as prohibited discrimination. This moves the European approach to discrimination into the category of a universal right in the sense that all persons have a right to equal treatment under law, in a more meaningful sense than in U.S. practice, under which the great majority of individuals—not belonging to a protected class—have no significant right to protection against arbitrary discrimination.

The language of Article 14 does, however, contain a very consequential limitation on this universal right. It applies only to discrimination impairing “the rights and freedoms set forth in this Convention.”²⁵ The Strasbourg Court realizes the injustices that the limitation, if read literally, would sanction. A limitless variety of arbitrary or oppressive state actions or omissions based entirely on maliciously discriminatory motives could theoretically fall outside of the protections of Article 14 so long as the unequal treatment did not deprive the applicant of a right specifically enumerated in the Convention. If the Convention specifies no right to parental leave in the case of childbirth (and it does not), and a party to the Convention provides in its law for paternal but not maternal leave, then there is no prohibited discrimination under the literal terms of Article 14, because the discrimination impairs no right or freedom set forth in the Convention. Clearly, this is not a sufficient minimum guarantee of equal rights.

The Strasbourg Court has indirectly addressed this problem, but it has done so inconsistently. It has taken the position that the “application of Art. 14, does not necessarily presuppose the violation of one of the substantive rights protected by the Convention. It is necessary but it is also sufficient for the facts of the case to fall ‘within the ambit’ of one or more” articles of the Convention.²⁶ The court has sometimes accordingly interpreted the ECHR to provide a guarantee against arbitrary discrimination to the detriment of, not a right specifically guaranteed by the Convention, but an interest that falls within the same general subject matter as the human right.²⁷ A state that grants a benefit or imposes some burden “within the ambit” of a protected right may not discriminate arbitrarily. Of course, the court has never defined clearly just what kinds of treatment fall “within the ambit” of a Convention right and

24. See Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 2000, Europ. T.S. No. 177, available at <http://conventions.coe.int/Treaty/en/Reports/Html/177.htm>.

25. ECHR, *supra* note 3, art 14.

26. 26. E.B. v. France, App. No. 43456/02, para. 47 (Eur. Ct. Hum. Rts. Jan. 22, 2008) (footnote omitted), available at <http://www.echr.coe.int/>.

27. See, e.g., Petrovic v. Austria, 1998-II Eur. Ct. H.R. 579; Schmidt v. Germany, 291-B Eur. Ct. H.R. (ser. A) (1994); Abdulaziz v. United Kingdom, 94 Eur. Ct. H.R. (ser. A), paras. 68, 71, 79-82 (1985).

which do not, which would seem to indicate a doctrine that is highly discretionary or flexible. But the blame for the ambiguity cannot be laid at the court's doorstep; when forced to choose between an unsatisfactory human rights jurisprudence and absolving the state parties of liability for very serious and arbitrary inequalities in treatment, the court has properly chosen the former in recognition that, to tweak Reisman's phrasing a little, "in a crunch, human beings and not perfectly consistent doctrines matter."²⁷

IV. THE UNIVERSAL EQUAL RIGHTS APPROACH

The European Union and Council of Europe are evidently aware of the challenge that Article 14 poses to a coherent human rights doctrine. The nonbinding European Charter prohibits in Article 21 "any discrimination" on the enumerated grounds, meaning discrimination with respect to any law.²⁸ Similarly, Optional Protocol No. 12 to the European Convention on Human Rights (ECHR) extends the nondiscrimination obligation beyond the rights enumerated to encompass unequal treatment under any law.²⁹ The fact that one of these instruments is nonbinding and the other optional (and not yet widely subscribed) does not create any special problem because all major international human rights conventions have similar prohibitions on discrimination in any law and on any grounds.³⁰

Article 26 of the International Covenant on Civil and Political Rights prohibits "any discrimination"³¹ that is, according to the Human Rights Committee, "based on any ground."³² Most state legislation discriminates against some people based on their status. Every state discriminates based on age in granting the right to vote. Progressive income taxes discriminate against the wealthy. As the Strasbourg Court recognized, if such an interpretation were accepted, "[o]ne would, in effect, be led to judge as contrary to the Convention every one of the many legal or administrative provisions which do not secure to everyone complete equality of treatment"³³ The court has accordingly defined discrimination to include only differences in treatment "without an objective and reasonable justification [of] persons *in relevantly similar situations*."³⁴ The Inter-

27. See Reisman, *supra* note 1 and accompanying text.

28. Charter of Fundamental Rights of the European Union art. 21, Dec. 7, 2000, 2000 O.J. (C 364) 1.

29. ECHR, *supra* note 3, art. 1.

30. See, e.g., CEDAW, *supra* note 2, art. 1; African Charter on Human and Peoples' Rights art. 19, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev. 5, 21 I.L.M. 58; see also American Convention on Human Rights art. 24, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; International Covenant on Civil and Political Rights art. 26, Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]; Universal Declaration of Human Rights art. 7, G.A. Res. 217A, at 71, U.N. GAOR, 3d. Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); Office of the United Nations High Comm'r for Human Rights [OHCHR], Human Rights Comm'n, *General Comment No. 18: Non-Discrimination*, ¶ 12 (Nov. 10, 1989).

31. ICCPR, *supra* note 30, art. 26.

32. OHCHR, *supra* note 30, ¶ 7.

33. Belgian Linguistic Case No. 2, 6 Eur. Ct. H.R. (ser. A) para. 10 (1968).

34. D.H. v. Czech Rep., App. No. 57325/00, para. 175 (Eur. Ct. Hum. Rts. Nov. 13, 2007) (emphasis added) (citing Willis v. United Kingdom, 2002-IV Eur. Ct. H.R. 311, para. 48), available at <http://www.echr.coe.int/>.

American Court of Human Rights has qualified the nondiscrimination right in a similar way, although in different words.³⁶ In each case, an exception is necessarily implied to allow the state to discriminate to the extent necessary and proportional to protect the legitimate interests of a democratic society, notwithstanding the sometimes absolute language of the prohibition on discrimination.³⁷

The flexibility created by these qualifications allows human rights decisionmakers to demand more cogent justifications for discrimination adversely affecting vulnerable, disempowered, or politically or socially disfavored groups,³⁸ or where the right is especially personal and sensitive to infringement.³⁹ The protected class approach, in contrast, tends to rely on heuristics that may or may not reflect social reality. Some groups, for example, may suffer disproportionately from discrimination in some ways and benefit from discrimination in others. A class approach tends to discourage nuanced inquiry into the social, political, and economic consequences of individual membership in the protected class. Under a universal rights approach, decisionmakers are left free to evaluate government action or inaction in social context and to weigh the degree of threat to the group members against the benefit to other members of society. This does not mean that the universal equal rights approach merges with the protected class approach; far from it. The former is much more susceptible to fine tuning and subjective judgment in balancing the interests of the state and affected individuals. The universal rights approach accordingly invites greater judicial or other human rights supervision of governmental action than universal substantive rights, such as the right to free speech and conscience or the right against torture, do. The human rights authority necessarily assumes the role of ombudsman with respect to any governmental legislation and action that operates to the detriment of any specific segment of society. This is at once an empowering and perilous role for a decisionmaker such as a judge or Human Rights Committee member. It is also a role that, as Frederick Schauer would predict, tends to lead human rights decisionmakers to invent ways to circumscribe their own authority through the adoption of narrowing rules⁴⁰—a pertinent example being the Strasbourg Court's margin of appreciation doctrine.⁴¹ On the other hand, when the decisionmaker hyperextends nondiscrimination principles, as the Inter-American Court did when it proclaimed that international law prohibits states from discriminating against illegal immigrant workers by denying any benefit whatsoever granted to

36. See Juridical Condition and Human Rights of the Child, Advisory Opinion No. OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17, at 56 (Aug. 28, 2002).

37. See, e.g., Framework Convention for the Protection of National Minorities art. 4, Feb. 1, 1995, 34 I.L.M. 351 (prohibiting "any discrimination" based on national minority group membership); CEDAW, *supra* note 2, art. 1 (defining discrimination to mean "any distinction" based on sex).

38. See, e.g., *Schuler-Zgraggen v. Switzerland*, 263 Eur. Ct. H.R. (ser. A) paras. 64-67 (1993).

39. See, e.g., *S.L. v. Austria*, 2003-I Eur. Ct. H.R. 71, para. 37; *L. & V. v. Austria*, 2003-I Eur. Ct. H.R. 29, para. 45.

40. See Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 808 (2005).

41. See, e.g., *Fretté v. France*, 2002-I Eur. Ct. H.R. 345.

workers legitimately in the country—as a matter of *jus cogens*, no less⁴²—even avid human rights advocates cringe at the authority’s self-undermining potential.⁴³

V. CONCLUSION

Treating nondiscrimination rights as universal rights runs contrary to the U.S. approach and diverges from the European approach to date, but I hope the foregoing discussion has demonstrated some advantages and risks of the universal equal rights approach. A protected class approach is unavoidably rigid and underinclusive. Human rights, as core values insusceptible to simplistic definition, demand a certain flexibility in scope. The Article 14 ECHR approach offers more flexibility but also tends toward underinclusiveness. The Strasbourg Court has mitigated that problem somewhat through creative interpretation, but it remains improvisational.

This is not to characterize the universal equal protection approach as some kind of panacea. Michael Reisman once observed that extending the human rights program “into areas beyond enforcement capabilities” tends to bleed away “the anger at atrocities, the motive force we bring to the program, and the very scarce resources we have for its implementation.”⁴⁴ The same warning applies to the interjection into the process of balancing competing political interests of human rights law in general, and the potentially all-engulfing nondiscrimination right in particular. The Strasbourg Court,⁴⁵ Inter-American Court,⁴⁶ and other human rights authorities have wisely recognized that, although the right to equal protection of the laws must include guarantees against discrimination based on any grounds and in any kind of state action, the right must also be tempered by limiting doctrines and restraint to avoid undue interference in democratic politics.

42. See *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion No. OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶¶ 101, 149, 153, 155 (Sept. 17, 2003).

43. See, e.g., James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT’L L. 768, 823 (2008).

44. W. Michael Reisman, *Through or Despite Governments: Differentiated Responsibilities in Human Rights Programs*, 72 IOWA L. REV. 391, 393 (1987).

45. See *supra* notes 26-27 and accompanying text.

46. See *supra* note 36 and accompanying text.